No. 10362.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Statement of the Facts.

Appellee makes the bald statement, on page 2 of its brief, that our summary of the evidence, commencing at page 2 of appellant's opening brief, "is replete with palpably inaccurate statements of fact, and is more or less a statement of what defendant's counsel believe the evidence should show." Appellee fails, however, to point out any inaccurate statements. No doubt in attempting to make a concise summary, as required by the rules of the Court, appellant omitted certain points which appellee considers important, but we keenly resent the implication involved in the words "palpably inaccurate statements of fact." There certainly was no such intention on our

part in preparing the statement of facts, nor was there such a result.

On page 3 of appellee's brief there is a statement that the Board believed the defendant was insincere. There is no reference to the Transcript of Record supporting that statement.

We again refer this Court to Defendant's Exhibit "A" [Tr. p. 79], the telegram from Col. Leitch, saying, "Will give matter consideration and determine appropriate action," and that on September 19, 1942, the defendant received a letter from Col. Leitch stating that they could take no further action in his case and then defendant did not submit himself for induction because he expected another induction order. [Tr. p. 87.]

With reference to the defendant's remarks to the Clerk of the Local Board, when he was informed, on September 2, 1942, that he would be sent an Order to Report for Induction in the near future, as set forth on page 4 of appellee's brief, the evidence on this point was conflicting, and the appellee's brief sets forth only the evidence favorable to appellee. The defendant himslf denied making the comments set forth at the top of page 4 of appellee's brief.

It must be apparent to the Court, from a reading of the statement of facts in appellant's brief and the statement of facts in appellee's brief, as well as the Transcript of Record, in this case, that there was a very sharp conflict in the evidence on a number of material points. The existence thereof affords a basis for and gives greater force to the appellant's arguments that the remarks of counsel for the Government, in her closing argument, and the conduct and comments of the Court, pointed out in appellant's opening brief, were prejudicial.

ARGUMENT.

Appellant will endeavor to answer appellee's brief point by point, in the order set forth in appellee's brief.

POINT XI.

The Evidence Is Insufficient to Support the Verdict of Guilty for the Reason That No Criminal Intent Was Proven.

I.

This Assignment of Error Is Properly Before This Court.

The very cases cited by appellee hold, as set forth on page 6 of appellee's brief, that "under certain circumstances the question of the insufficiency of the evidence to justify the verdict may be reviewed where a palpable and obvious miscarriage of justice would otherwise result."

See,

Ng Sing v. United States, C. C. A. 9, 1925, 8 F. (2d) 919, at page 921.

Also,

Bilboa v. United States, C. C. A. 9, 1928, 287 Fed. 125, at page 126.

II.

Sufficient Criminal Intent Was Not Proven to Support the Verdict of Guilty.

On page 12 of appellee's brief appears the following: "Defendant, without right, took it upon himself to do whatever was done." This statement refers to the action taken by the defendant in contacting the state and national Directors of Selective Service and the President. We take exception to the words "without right." The Selective Service Act gives the registrant the right to make such appeals. This matter will be gone into more fully under Points III, IV and V.

In connection with the attempt of the defendant to join the Federal Bureau of Investigation, the defendant stated that while he knew he might be required to carry a gun and shoot to kill if necessary (not all F.B.I. men carry a gun, defendant testified), that he would only be called upon to do so in the performance of his duty, in the same manner as a police officer, and he acknowledged the place of police officers in our society.

We must keep in mind at all times the training which was given to our youth after the last war. They were brought up in an atmosphere of pacifism. After the last war the youth of this country was taught from pulpit and platform, from screen and stage, in the newspapers, magazines and books, in our homes, churches, public schools and private schools, colleges and universities, that war was wrong, the greatest of all evils. They were actually taught that they were to work and fight

for peace. Even the Boy Scouts were criticized because they wore uniforms. The generation to which appellant belongs was indoctrinated with such teachings. Pacifism was the order of the day. When changed conditions made "ancient good uncouth," and called for a sudden reversal in the thinking of the young men so trained, schooled and conditioned, some of them made their mental and emotional adjustment quickly, others more slowly, and some not at all. In the last group, to which the defendant belonged, pacifism had taken a deeper, stronger hold. We must keep this background in mind in judging of the defendant's criminal intent.

The entire record in this case shows an attempt upon the part of the defendant to solve this inner struggle. For example, in the matter of joining the State Guard of California, a number of the men with whom he was working had joined and were joining, and in order to receive the approbation of his fellows and avoid social ostracism, he joined the State Guard, upon the understanding that it would not be used to wage war, but merely to perform guard and police duties. This man was not an anarchist. He tried to be a good citizen according to his lights, and was at all times in favor of upholding and enforcing the law. He registered under the Selective Service Act, and did not claim to be a conscientious objector in the Selective Service Questionnaire, for the reasons hereinafter more fully set forth. When we were actually in the war he was willing to perform noncombatant military service, and requested a change of

classification only when he learned that sometimes men so classified were ordered to do work which was of a combatant nature. His course throughout was consistently that of a conscientious objector who, at the same time, was trying to hold his place in society. It was a difficult problem of reconciliation and adjustment. It is freely admitted that he erred at times, for example, in not being willing to face the issue from the outset and take the stand he finally did take, and which was the only one that in good conscience he could take. Defendant testified that he did not file the special form for conscientious objectors until about thirteen months after the Selective Service Questionnaire because he did not want to be looked down upon and because of circumstances, people and general conditions; that because the draft was talked up to be just a physical training program of one year—the President said it was only within our country and the Gallup Poll said 80 percent of the people would not sanction the war, he did not think he would ever be required to kill. [Tr. pp. 84-85.] Evidence admitted, as well as evidence offered but excluded (and which will be hereafter more fully considered), show conclusively that it was not the danger involved which caused the defendant to pursue the course he did. It was a matter of principle. He should not be condemned and punished as a criminal because of his principles.

POINT I.

The Remarks of Plaintiff's Counsel in Argument to the Jury Were Prejudicial.

For convenience we again quote the particular portion of the closing argument to the jury complained of, as follows:

> *"I ask you gentlemen to bring in a verdict worthy of a man of this caliber who is willing to let your sons and brothers and friends go out and give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf."* (Emphasis supplied.)

I.

It Is Admitted That the Question of Prejudice Turns Upon the Facts of Each Particular Case.

In connection with the case of *U. S. v. Socony Vacuum Oil Co.,* 310 U. S. 150, cited on this point in appellee's brief, we call the Court's attention to the fact that that was a very long trial; in the case at bar the trial was short, not quite three full days. This is an important element in connection with weighing the prejudicial effect of the language in question.

II.

The Authorities Do Not Support the Contention of Appellee That the Remarks of Counsel Cannot be Questioned on Review Where Attention of Court Below Was Not Directed Thereto and a Ruling Made and Excepted To.

The principal case relied upon by appellee in support of its contention, to-wit, *U. S. v. Socony Vacuum Oil Co., supra,* does not stand for this proposition. At page 239 of the opinion the Court quotes from *U. S. v. Atkinson,* 297 U. S. 157, at page 160, as follows:

> *"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceeding."* (Emphasis supplied.)

Furthermore, in *U. S. v. Socony Vacuum Oil Co., supra,* at page 240, the Court further condemns appeals to passion and prejudice by the Government's counsel, and says that even in a strong case such an appeal may require a reversal. At page 242 the Court points out, however, that in that case the comments "were isolated, casual episodes in a long summation of over 200 printed pages, and not at all reflective of the quality of the argument as a whole."

Without going into too much detail we should like to point out that the authorities cited on page 18 of the appellee's brief are clearly distinguishable, as follows:

(a) *Utley v. U. S.,* 115 Fed. (2d) 117. The complaint was made that the defendant was described as

a narcotic peddler, but the Court points out that there was "no such allusion."

(b) *Heskett v. U. S.,* 58 Fed. (2d) 897. At page 901 the Court says: "In any event, we do not believe that the District Attorney's remark was reversible error."

(c) *Dampier v. U. S.,* 2 Fed. (2d) 329. At page 331 the Court says: "The language complained of is not embodied in the bill of exceptions under the certificate of the trial judge."

(d) *Donaldson v. U. S.,* 208 Fed. 4. There is merely a bald statement of law on page 7 without any discussion, limitations or exceptions and no citation of authorities.

(e) *Vandetti v. U. S.,* 45 Fed. (2d) 543. At page 544 the Court says: "Doubtless, statements by counsel may prove so prejudicial to the rights of a party as to necessitate the granting of a new trial, or a reversal on appeal; but the statements here complained of do not fall within that category."

It is further to be noted that in *U. S. v. Socony Vacuum Oil Co., supra,* at page 237 the Court pointed out that "It is not improper in a Sherman Act case to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. For that subject is material to the philosophy of that Act." And again at page 240 the Court says: "Of course, appeals to passion and prejudice may so poison the minds of jurors, even in a strong case, that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts."

It is apparent, therefore, that it depends upon the facts of the particular case, whether the reviewing court will consider objections based upon remarks of counsel, even though not called to the attention of the court below and a ruling made thereon and exception taken thereto.

III.

We Maintain That the Remarks of the Counsel in the Case at Bar Constituted Such an Appeal to Passion and Prejudice and Were in Fact So Prejudicial, by Reason of Which the Defendant Was Deprived of a Fair Trial, as to Justify and Require This Court to Take Notice of the Error and Reverse the Judgment of the Court Below.

We concede the force and effect of the authorities cited under this heading on pages 19 and 20 of appellee's brief. We respectfully call the Court's attention to the fact that, in *Chadwick v. U. S.,* 141 Fed. 225, at page 245, Judge Lurton condemned argument of Government's counsel which was plainly "calculated to arouse prejudices incompatible with even-handed justice or an orderly course of procedure."

We respectfully submit that the language of Government's counsel complained of by the appellant was "calculated to arouse prejudices incompatible with even-handed justice." As a matter of fact, it must have been intended to have that effect. Otherwise why was it employed? It could have no other effect, as Government's counsel well knew. It was, therefore, not only calculated but intended to arouse the passions and prejudices of the

jurors. The words were indeed inflammatory, and "so grossly unwarranted and improper as to be palpably injurious to the accused." (*Chadwick v. U. S., supra,* at page 246.)

It is true that in the *Chadwick* case the Court was dealing with a notorious character, the one and only Cassie Chadwick, whose activities will never be forgotten by those who read about them at the time when she was for so long front page news. No court could let her loose.

In the last case cited by appellee on this point, namely *Pietch v. U. S.,* 110 Fed. (2d) 817, at page 822, the Court says:

> "Attorneys for the Government are free to make earnest and vigorous argument to the jury, but they are not privileged to transgress recognized canons of propriety by endeavoring to arouse passion or prejudice. Berger v. U. S., 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314."

We contend that the case at bar is clearly and palpably one which does transgress said recognized canons, and that it comes squarely within the language and authority of *Vierick v. U. S.,* 318 U. S. 236, and the quotations therefrom on page 7 of appellant's opening brief.

IV.

Appellant Contends That the Remarks of Government's Counsel Did Constitute a Denial of a Substantial Right and Prevented Defendant From Having a Fair Trial, and Hence Was Prejudicial.

In the case of *Goldstein v. U. S.*, 63 Fed. (2d) 609, at page 614, the Court says:

> "A reading of the entire record in this case indicates to our minds that the remarks complained of were not intended or calculated to create in the minds of the jurors a prejudice against the defendant."

Moreover, in the *Goldstein* case the Court did, as between the actual parties, maintain "an absolute impartiality." (See page 614.)

In the case at bar we contend that we have shown, on pages 13 to 15, inclusive, of appellant's opening brief, that the Court did not maintain "an absolute impartiality." And as to whether "the remarks complained of were not intended or calculated to create in the minds of the jurors a prejudice against the defendant," we respectfully refer the Court to what we have heretofore said herein on this point. It must be apparent that the remarks in question, particularly under the existing conditions at the time they were made, with the country at war and at least some members of the jury in all probability, on the law of averages, having "sons and brothers and friends" in the armed forces of our country, and hence peculiarly susceptible to the effect of such an appeal and argument, were not only calculated but also intended to create such a prejudice in the minds of the jurors.

In *Mansfield v. U. S.*, 76 Fed. (2d) 224, at page 232, the Court says:

> "An Appellate Court should hesitate to reverse a case for the alleged misconduct of the trial *unless it appears that the remarks complained of tended to disparage the defendant before the jury and to prevent the jury from rendering an impartial judgment in the case.*" (Emphasis supplied.)

1. We Concede That the Entire Record Must be Considered.

At the bottom of page 21 of appellee's brief, a portion of the Court's opinion in the case of *Ippolito v. U. S.*, 108 Fed. (2d) 668, at page 670, is quoted. We deem it pertinent to set forth all that the Court says having a bearing on the point at issue, as follows, to-wit:

> "In Pierce v. United States, 6 Cir., 86 F. (2d) 949, we had occasion to review many of the cases dealing with improper argument of counsel and appeals to the passion and prejudice of a jury. We observed that while by Section 269 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 391, not every technical error which does not affect the substantial rights of parties furnishes ground for reversal, yet the inquiry must always be as to whether in view of the whole record the impression conveyed to the minds of jurors by prejudicial matter is such that the court may fairly say it has not been successfully eradicated by the rulings of the trial judge, his admonition to counsel and his instruction to the jurors to disregard it. *Sometimes a single misstep may be so destructive of a right of a defendant to a fair trial that reversal must follow.* Pharr v. United States, 6 Cir., 48 F. (2d) 767. Frequently error that might otherwise be noted is disregarded where the evidence

of guilt is so overwhelming that the error cannot be said to be prejudicial. Fitter v. United States, 2 Cir., 258 F. 567, 573; Cf. Bogy v. United States, 6 Cir., 96 F. (2d) 734. There was no overwhelming evidence of guilt in the present case.

"It ought to be unnecessary to again admonish counsel as we did in the Pierce case, or to quote from decisions of the Supreme Court as to the limits of fair comment, but if prosecuting officers persist in ignoring the warning of the courts, develop no consciousness of obligation imposed upon them by their high office, we must again call attention to what was said in Berger v. United States, 295 U. S. 78, 89, 55 S. Ct. 629, 633, 79 L. Ed. 1314. *'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer,'* and with aim to preserve the high repute of Federal Courts for fair and impartial administration of law, to repeat what was cited from New York Central Railroad Company v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706, *'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice,'* and again from the Berger case, 'But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. *It is impossible to say that the evil influence upon the*

jury of these acts of misconduct was removed by such mild judicial action as was taken.'" (Emphasis supplied.)

As to the case of *Peitch v. U. S.*, 110 Fed. (2d) 817, being the second case cited by appellee on this point, we respectfully refer the Court to the quotation therefrom above set forth.

2. The Cases Cited Under This Point on Pages 22 to 24 Inclusive of Appellee's Brief Are Not Applicable to the Facts of the Case at Bar and Do Not Preclude Reversal of the Judgment Herein.

In the first place, appellee contends that "the remark made by counsel was not improper, as it was only a statement reflecting the general conditions of the time." It is respectfully submitted that no extended argument is necessary to prove that the very conditions of the time created an atmosphere and setting—a fertile soil—for the inflammatory remarks of counsel to take root and mushroom into a tremendous obstacle against a fair and impartial consideration of the evidence pro and con, particularly on the score of criminal intent. This is not an open and shut case. It was not a case where the guilt of the defendant was overwhelmingly established by the evidence. As heretofore pointed out, and as the reading of the Transcript of Record will show, there was a very sharp, decided conflict in the evidence on a number of material points having a direct bearing on the question of criminal intent. It would unduly extend this brief to point them all out. Some have already been indicated in the appellant's opening brief, others in this closing brief, and the rest will appear to the Court from the reading of the Transcript of Record. So that while we recognize

the validity of the authorities cited on this point, we seriously and strenuously contend that they are not applicable to the facts of the case at bar.

Appellee, on page 23, cites the case of *Fitter v. U. S.*, 258 Fed. 567. At page 572 the Court says:

> "Prosecuting attorneys should be careful not to depart from their line of duty, and it is the plain duty of the trial court not to allow an appeal to be made to a jury for conviction upon considerations which have no legitimate bearing upon the case and which the jury would have no right to consider. *And where this duty has not been performed it is the plain duty of the appellate court to set aside the judgment unless it is convinced that no possible harm has resulted.*" (Emphasis supplied.)

We respectfully ask this Honorable Court, whether it can in all sincerity and good conscience say that it is convinced that "no *possible* harm has resulted" to this defendant, when the jury was so exhorted and appealed to by the Government's attorney, at a time when the country was at war, and perhaps some of the jury's "sons and brothers and friends" had paid the supreme sacrifice or were even at that very time suffering from wounds and diseases incurred in said war. We respectfully submit that there can be only one answer to this question.

In the case of *Robbins v. U. S.*, 229 Fed. 987, cited at page 24 of appellee's brief, at page 988 the Court says:

> "No possible misconduct on the part of the District Attorney could have affected the conclusion which the jury was compelled to reach."

This is not so in the case at bar. While the failure to report for induction was admitted, there was quite a

serious question and sharp conflict on the matter of criminal intent, as we have heretofore pointed out, and the jury could well have reached the conclusion that there was no criminal intent in the case at bar, and might well have done so were it not for this appeal to passion and prejudice of the jury.

3. **The Remark Complained of, While an Isolated Instance, Was Not Merely Incidental, But Went to the Heart of the Case and Was Sufficient to Create Prejudice in the Minds of the Jurors.**

The case at bar is not at all like the case of the *U. S. v. Socony Vacuum Oil Co., supra,* where the argument was over 200 pages. Neither is the case of *Silverman v. U. S.,* 59 Fed. (2d) 636, applicable, because in the case at bar we do have, in the Transcript of Record, the portion of the argument of defendant's counsel bearing upon the matter in issue, so that we can appraise the surrounding circumstances and justification, if any, for the argument of Government's counsel.

4. **The Remarks of Government's Counsel Complained of Were Not Provoked or Invited by Opposing Counsel.**

The Transcript of Record, at pages 105 to 108, inclusive, contains the arguments of Government's counsel on this point. A portion thereof is cited on page 26 of appellee's brief.

We contend, however, that a reading of that portion of the argument of defendant's counsel contained in the Transcript of Record, will afford no basis, provocation, excuse or justification whatsoever for the inflammatory remarks of the Government's counsel. These remarks were not in answer to anything said by the counsel for

the defendant, nor proper comment thereon. On the contrary, the remarks of the Government's counsel to which we object were a deliberate and unmistakable exhortation to the jury to convict upon patriotic and personal grounds by arousing the passions and prejudice of the jury.

As to the authorities cited under this point in appellee's brief, the case of *Johnson v. U. S.*, 126 Fed. (2d) 242, is not in point because in that case the preceding argument of the defendant's counsel, which the Government's counsel was endeavoring to meet, was not in the record. In our case it is in the record. Furthermore, in our case the attorney for the Government was not endeavoring to counteract certain arguments made by the defendant's counsel; she was endeavoring to arouse the passions and prejudice of the jury. It could not have been made for any other purpose. The mere fact that the defendant's counsel mentioned the war does not afford the provocation which the cases require, nor exonerate the Government's counsel nor remove the prejudice which resulted from said remarks. Moreover, the argument in said *Johnson* case, as set forth in the foot-note on page 248, is not nearly as pointed and direct an appeal to passion and prejudice as the remarks in the case at bar.

Again in the case of *Pollock v. U. S.*, 35 Fed. (2d) 174, the remarks of counsel were provoked and justified by the conduct of the defendant's attorneys. At page 176 the Court says:

> "From the beginning of the trial the attorneys for the defendant Pollock repeatedly endeavored to get the record of the former conviction before the jury, especially for the purpose of supporting the plea of former conviction, and while it is true that the court

did refuse to admit the record of the former conviction, for that purpose, yet the Court found as a fact that both sides had repeatedly referred to the former conviction during the course of the trial, and refused to exclude the remarks of the U. S. Attorney."

Again, at page 176 the Court says, in the *Pollock* case:

"We do not see how defendants could possibly have been prejudiced by these remarks, even admitting they were not proper."

And at page 176 the Court also says:

"The statement made by the U. S. Attorney was not made in any unfair or vicious manner, and was simply a statement of fact admittedly true."

Can the same be said of the remarks of Government's counsel in the case at bar? We submit that in all fairness it cannot. The slur in the language "hide behind the defenses" is not only untrue in fact and highly prejudicial but also misleading as to the law. For a man has a legal right to avail himself of all defenses allowed him under the law, and when he does so he is not "hiding" but exercising his legal rights.

So, too, in *Rice v. U. S.*, 35 Fed. (2d) 689, at page 695, appears the following:

"The Appellants introduced evidence as to this merger and the properties there combined and sought to obtain the benefit from this testimony. With the evidence thus introduced by the Appellants, it was proper argument for counsel to refer to that merger and characterize it as he did."

We submit that there is no evidence whatsoever in the record, nor any comment of the defendant's counsel on

any evidence, which would justify in the slightest degree, or give any basis whatsoever, for the comment of the Government's counsel in the case at bar.

In the case of *Johnson v. U. S.,* 154 Fed. 445, the District Attorney in his closing argument said:

> "Then came this man Johnson, this hired gunfighter, this hired ruffian." (see page 449.)

At page 449 the Court says:

> "The use of language by counsel, calculated to prejudice a defendant and not justified by the evidence, is improper and censurable, and should be discountenanced by the court. *In such a case, it is the duty of the trial court to set aside the verdict unless satisfied that the improper language was not instrumental in securing it.*" (Emphasis supplied.)

In that connection, it is submitted that it is very doubtful that even if an objection had been made by the defendant's counsel to said remarks of the Government's counsel, and the jury instructed to disregard the same, whether any such instruction by the Court could have remedied the harm done by such an appeal to the passion and prejudice of the jury. The fire which had been started in their hearts and minds by the appeal in question could hardly have been put out by a few words spoken by the trial court. The damage was done when the words were spoken, and the only remedy lies in the hands of this Court, namely, to set aside the conviction.

In an exhaustive note on the case of *People v. Fielding,* 158 N. Y. 542, to be found in 46 L. R. A. 641, at page 668, the writer states the rule thusly:

> "The courts are quick to interfere when it appears that anything like passion, prejudice, fear or

public opinion *may* have influenced the verdict of juries." (Emphasis supplied.)

Numerous cases are cited in support of the proposition.

In connection with prejudicial effect on the jury, as was stated by the Court in *Pierce v. U. S.*, 86 Fed. (2d) 949, at page 953,

> *"that it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so."* (Emphasis supplied.)

As bearing upon the claimed provocation by reason of the remarks of defendant's counsel, what was said by the Court in *Pierce v. U. S., supra,* at page 953, is equally applicable here, as follows, to-wit:

> "Similar latitude in respect to irrelevant matter permitted to counsel for the defendants neither vindicates nor palliates the license assumed by the Prosecutor, nor lessens its destructive effect upon the fairness of the trial. *Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the Government itself be there a litigant."* (Emphasis supplied.)

Then, after quoting from *Berger v. U. S.*, 295 U. S. 78, and *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318, the Court, in the *Pierce* case, at page 954, concludes as follows:

> *"Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error."* (Emphasis supplied.)

POINT II.

The District Court Did Err in Making the Comments Complained of During the Course of the Trial.

I.

Alleged Error Relating to Comments of Trial Judge Are Properly Before the Court.

The authorities heretofore cited to the effect that the Appellate Court may consider the prejudicial effect of arguments of counsel, even though no objection was made thereto in the court below, are equally applicable to the comments and conduct of the Court.

II.

The Procedure in the Course of Which the Comments Were Made Does Disclose That They Were Improper and Prejudicial.

In addition to the cases cited on pages 14 and 15 of appellant's opening brief, we respectfully refer the Court to the following.

People v. Rongetti, 331 Ill. 581, 163 N. E. 373, where the Court says:

> "One of the first purposes of orderly administration of the law is that a defendant, whether guilty or innocent, shall be accorded a fair trial. The fact that the judge may consider the accused to be guilty in nowise lessens his duty to see that he has a fair trial."

Also in the case of *State v. Coss,* 101 Pac. 193, 53 Or. 462, in referring to certain comments of the court below, the Supreme Court of Oregon, at page 197, says:

> "They indicated an attitude of the Court towards counsel for the defense and the manner in which they were conducting the case which was calculated to prejudice their client with the jury, although evidently not so intended. It may be that the remarks, in a measure, were provoked by the conduct of the attorneys and the tediousness of the cross-examination of the prosecutrix, but this would not justify their utterance or destroy their effect upon the jury, for, as said by Mr. Justice Thayer, in State v. Clements, 15 Or. 237, 14 Pac. 410: *'If there is any one virtue in the judicial mind entitled to superior excellence, it is patience to hear and determine matters involving the rights and liberties of those charged with the commission of a crime.'"* (Emphasis supplied.)

III and IV.

Prejudice Could Possibly Result and Did Result to the Defendant From the Comments Made.

As a matter of convenience we are considering III and IV together. The members of this Honorable Court are too familiar with the power and influence exercised by the trial judge over the jurors for us to take up any time laboring this point. This is particularly true in the case of a United States District Court, for it is a matter of common knowledge that the Federal judges are almost

universally held in high regard by the masses of our citizens. Unfortunately this is not always true in the case of our State trial courts. The general rule is very well set forth in one of the cases cited by appellee on page 31 of appellee's brief, to-wit, *Adler v. U. S.,* 182 Fed. 464, where, at page 472, the Court says:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. *The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury.*" (Emphasis supplied.)

With the authorities cited by appellee on pages 30 to 34, inclusive, on this point, we have no quarrel, but we contend that they are not applicable to the facts of the case at bar. By way of an example, we respectfully refer the Court to the case of *U. S. v. Krakower,* 86 Fed. (2d) 111, where, at page 112, the Court says:

> "Defendant went on the stand and admitted every element of the crime. * * * Possibly it is true that the trial judge showed some animus against him, *but as there was no possible justification for an acquittal we will not look jealously at what, in a case where there was any dispute, might detain us.*" (Emphasis supplied.)

POINTS III, IV and V.

The District Court Erred in Refusing to Admit in Evidence Defendant's Exhibits "C," "K," "N" and "O."

These points are considered together because they involve the same questions of law. We find no fault with the authorities cited by the appellee in its brief on these points, but again we contend that they are not applicable to the case at bar. It appears that we have sufficiently discussed these exhibits in our opening brief. We do wish, however, to direct the Court's attention to the fact that defendant denied making the statement with reference to the F.B.I. which is cited at the bottom of page 37 of appellee's brief. Moreover, we wish also to call the Court's attention to the fact that the Local Board Clerk did not claim that the defendant said that he would not take the oath, but only that the defendant said that he did not know whether he could take the oath. The defendant himself denied making any such statement. Appellee states repeatedly that the defendant "without right" attempted to contact the State Director of Selective Service, as well as the National Director of Selective Service. The fact of the matter is that, under Section 628.1 of the Selective Service Rules and Regulations, either the State or National Director may take an appeal to the President when he "deems it to be in the national interest or necessary to avoid an injustice." The Court may take judicial knowledge of the fact that the only way that either the State or National Director

of Selective Service can form such a conclusion is by having the particular case called to his attention. The first step, therefore, in an appeal to the President is for the registrant to make his appeal to either the State or National Director of Selective Service. In this case the defendant tried to do both, and Defendant's Exhibit "K" was part of that process. The defendant was therefore clearly within his rights and not "without right" in taking these steps.

As to Exhibit "N," while it is true that the National Service Board for Religious Objectors is not an agency of the Government, nevertheless the purposes of said Board are self-evident from the name, and certainly Exhibit "N," received by the defendant, should have been admitted along with Exhibit "O," as having a bearing on the criminal intent and the state of mind of the defendant at the time. For ready reference we repeat, Exhibit "N," addressed to the appellant, reads as follows:

> "Advise induction order should not have issued until ten days after classification.
>
> National Service Board for Religious Objectors."

POINT VI.

This Assignment of Error Should be Considered by This Court.

It may well be that this assignment of error does not comply with the technical rule, but we submit that what was said in the case of *Pierce v. U. S., supra,* has application here.

It is further submitted that the matters covered in the statement which was stricken are not to be found elsewhere in the Transcript of Record, as an examination thereof will show, at least not as fully as in the stricken portion.

POINTS VII, VIII, IX and X.

The District Court Did Err in Refusing to Give the Several Instructions Covered by These Points.

Again we do not question the authorities cited by the appellee in its brief on these points, but do question their applicability to the case at bar. Defendant's Exhibit "A," being a telegram from State Director of Selective Service Leitch was such as to lead a reasonable man to conclude, or at least was such that might reasonably lead the appellant to believe, that his induction was stayed, at least temporarily.

The indictment charged that "the defendant did then and there, knowingly, wilfully, unlawfully and feloniously fail to report for induction into the Armed Forces of the United States" [Tr. p. 3], and the defendant was entitled to separate instructions on each one of those points.

Conclusion.

In conclusion, we respectfully refer this Honorable Court to a portion of the dissenting opinion of Judge Denman in *Hopper v. U. S.*, 142 Fed. (2d) 181, at page 187, as follows:

> "If there be any group of cases where the requirement of 28 U. S. C. A. Sec. 391 to ignore technical defects should be observed, it is in those of the conscientious objectors. The Supreme Court has made clear enough the wrong in the approach of the trial of Jehovah's Witnesses as if they are all draft dodgers 'who should be sent to the front line trenches.' A great part of the youth of that religious organization belong to the generation whose adolescence came in the period between the first and second World Wars. That was the period when parents proclaimed 'We did not bring our boy into the world to become a soldier.' Mothers drilled into their sons the horror of war in which they would have to maim and kill their fellow man."

For the reasons stated in our opening, as well as in this closing brief, it is respectfully submitted that the conviction of appellant should be set aside and the judgment vacated.

Respectfully submitted,

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